

Implementing international human rights into domestic law & policy : The Canadian experience

Right to culture and cultural diversity

Training for Taiwanese officials
October 2012

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Presentation Outline

- Cultural rights at international law
- How Canada implements cultural rights and supports cultural diversity – General
- How Canada implements cultural rights and supports cultural diversity – Case studies:
 - Integration of immigrants
 - The rights of Aboriginal peoples
 - Accessibility of cultural goods & services for persons with disabilities

Cultural Rights at International Law

Cultural rights at international law

- There is no one right to culture at international law; rather, there are many international instruments that protect different aspects of culture and confer rights on individuals in relation to culture.

- Here is one way to organize and think about the various aspects:
 - ***Rights relating to culture*** (e.g., protection of creative activity and the conditions under which it flourishes)
 - ***Rights to a culture and to its survival*** (e.g., participation in a minority culture; participation in the culture of one's State; the right to benefit from scientific advances; preservation of cultural heritage)

- There is no single definition of the word “culture” in international law; most international instruments dealing with culture do not define it.

Cultural rights at international law

- **UNESCO** *Universal Declaration on Cultural Diversity* defines culture as:

“the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”

Cultural rights at international law - interpretation

- Cultural rights are set out in a number of treaties. We will focus today on the ICCPR and ICESCR.
- Treaty provisions often use language that is broad and sometimes ambiguous; they require interpretation in good faith and in accordance with their “ordinary meaning”, in their context and in light of the treaty’s object and purpose.
- Where can we look for more guidance about what a treaty provision means?
 - Periodic reports by States Parties on how they are implementing the provisions (may establish agreement of parties on proper interpretation);
 - Decisions of international or domestic courts interpreting the provision or a similar provision; also, expert academic commentary;
 - General Comments of the UN treaty bodies (e.g., Human Rights Committee General Comment No. 23 on ICCPR, Article 27) (non-binding);
 - Views of the UN treaty bodies in individual communications (non-binding);
 - International declarations, resolutions, and other instruments, and commentary of other UN expert mechanisms (e.g., UN Special Rapporteurs) (non-binding).

Cultural rights at international law - ICCPR

International Covenant on Civil and Political Rights (ICCPR)

- **Article 27:** Right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, practice their own religion or use their own language, in community with other members of their group.
- Other provisions that protect aspects of culture and support cultural diversity:
 - **Right to equality and non-discrimination** on grounds including race, colour, language, religion, national or social origin (Articles 2 & 26)
 - **Freedom of religion, expression, peaceful assembly and association** (Articles 18-22); **right to political participation** (Article 25)
 - **Prohibiting advocacy of national, racial or religious hatred** (Article 20)

Cultural rights at international law - ICESCR

International Covenant on Economic, Social and Cultural Rights (ICESCR)

- **Article 15:** Right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to the protection of the moral and material interests resulting from scientific, literary or artistic production of which one is the author.
- Other provisions that protect aspects of culture and support cultural diversity:
 - **Right to equality and non-discrimination** on grounds including race, colour, language, religion, national or social origin (Article 2)
 - **Right to education** (Article 13)

Cultural rights at international law – Other sources

Convention on the Rights of the Child (CRC)

- Child's ethnic, religious, cultural and linguistic background to be considered when child placed in alternative care (Article 20)
- Aims of education to include respect for child's cultural identity and different civilizations (Article 29)
- Right of child to participate in minority culture (Article 30)
- Right of child to rest, leisure, play, recreation and to participate in cultural life (Article 31)

Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- Obligation to eliminate racial discrimination in all its forms; right to participate in cultural activities without racial discrimination (Article 5)

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- Obligation to modify social and cultural patterns of conduct to elimination discrimination against women (Article 5)

Convention on the Rights of Persons with Disabilities (CRPD)

- Right of persons with disabilities to participate in cultural life, recreation, leisure and sport on an equal basis with others (Article 30)

UN Declaration on the Rights of Indigenous Peoples (non-binding)

Cultural rights at international law

What does the right to participate in a minority culture mean? (ICCPR, Article 27)

“protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.” (UN Human Rights Committee, General Comment No. 23) (non-binding)

- protects persons belonging to a group sharing in common a culture, religion and/or language
- culture may consist in a particular way of life associated with land and the use of its resources (e.g., fishing, hunting, living on reserves), especially in the case of indigenous peoples
- “existence” of minority is based on objective criteria, not on official state recognition
- extends to non-citizens belonging to minority groups
- requires states not to interfere; states may also need to take positive measures to protect minority’s identity and members’ right to enjoy and develop their culture

Cultural rights at international law

What does the right to take part in cultural life mean?

(ICESCR, Article 15)

- extends to everyone, not just persons belonging to a minority group
- cultural life may include a strong communal dimension, particularly in the case of indigenous peoples
- includes the right to participate in, have access to, contribute to cultural life
- requires states not to interfere; also requires states to take positive measures, subject to progressive realization standard in Article 2
- subject to limits that may be necessary in a particular case (e.g., negative cultural practices that infringe other human rights), if the limit is compatible with the nature of the right and for the purpose of promoting the general welfare in a democratic society (Article 4)

- See for example the Committee on Economic, Social and Cultural Rights, General Comment No. 21 (non-binding)

How Canada Implements Cultural Rights and Supports Cultural Diversity – General



"Canada's Citizens", by Kanika Lawton, Pinetree Secondary School, Coquitlam, British Columbia.

Description: This pencil crayon drawing shows images representing the different people, cultures and ethnic backgrounds found in Canada. The artist has depicted Mathieu Da Costa and Samuel Champlain in the middle. The colourful background includes images of many Canadian landmarks, such as Parliament Hill.

Cultural diversity in Canada

- As a multicultural society, cultural diversity is viewed as a core Canadian value and part of Canadian identity.
- Some demographic information about Canada:
 - Three founding peoples (Aboriginal peoples, English and French)
 - Two official languages (English and French)
 - 147 different mother tongue languages reported (2006 Census) – Chinese languages are the third largest mother tongue group (3% of population).
 - Over 200 different ethnic origins reported (2006 Census) – largest groups are the English, French, Scottish, Irish, German, Italian, Chinese, Aboriginal, Ukrainian, Dutch, South Asian and Scandinavian. Since the 1970s, most immigrants have come from Asian countries.
 - 615 First Nation communities, representing more than 50 cultural groups and 50 Aboriginal languages
 - 20% of Canadians are foreign-born.
 - The majority of Canadians identify as Christians – largest religious affiliation is Catholic, followed by various Protestant churches. The numbers of Muslims, Jews, Hindus, Sikhs and members of other religions, as well as people who report no religious affiliation, are growing.
- Demographic projections show increasing diversity.

Implementation in Canada

Constitutional protections:

- **Constitution Act, 1982, section 35:** “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” Treaty rights include rights that now exist or may be acquired by way of land claims agreements. Aboriginal and treaty rights are guaranteed equally to men and women.
- **Charter, section 25:** Charter guarantees “shall not be interpreted so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada”.
- **Charter, section 27:** “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”



Implementation in Canada

Constitutional protections (continued):

- **Charter, sections 16-23:** Official languages – various rights relating to the equal status and use of English and French, including the right to use English or French in proceedings in courts established by Parliament, the right to receive federal public services in English or French, and minority official language education rights.
- **Charter, section 15:** Guarantees the right to equality and non-discrimination. Prohibited grounds of discrimination include race, national or ethnic origin, colour and religion. Section 15 permits targeted “ameliorative programs” (affirmative action) aimed at improving the situation of disadvantaged groups.
- **Other Charter rights** that support cultural rights and cultural diversity: freedom of conscience and religion, expression, peaceful assembly & association (section 2); right to vote and stand for election (section 3).
- **Charter, section 1:** The government may justify a limit on Charter rights where it pursued an important objective in a proportional manner. Accommodation of a wide variety of beliefs, and respect for cultural and group identity, are values that guide courts in applying section 1.



Implementation in Canada

Constitutional protections (continued):

- **“Unwritten constitutional principle”** of the protection of minorities, which underlies Canada’s entire constitutional order.
- **Constitution Act, 1867, section 93**: protection of minority religious education rights. **Charter, section 29**, states that nothing in the Charter abrogates or derogates from these rights.



Implementation in Canada

Legislative protections:

- **Equality and anti-discrimination legislation** (e.g., *Canadian Human Rights Act*; *provincial human rights codes*): Prohibits discrimination by public and private sector employers and service providers, on grounds including race, national or ethnic origin, and religion. Requires employers and service providers to meet their duty to reasonably accommodate difference (e.g., religious practices), meaning they have taken measures to eliminate disadvantages to employees or clients that result from a rule or practice that has an adverse impact on protected individuals or groups. Accommodation is to the point of undue hardship.
- **Employment equity legislation** (e.g., *federal Employment Equity Act*): Promotes representation in the federal public and private sector workplaces of certain historically disadvantaged groups, including “visible minorities” and Aboriginal persons. Requires employers to report on plans and achievement of goals.



Implementation in Canada

Legislative protections (continued):

- **Canadian Multiculturalism Act:** Reaffirms multiculturalism as a fundamental Canadian value and sets out the federal government's multiculturalism policy. Requires federal government to report annually on multiculturalism initiatives.
- **Citizenship Act:** Defines eligibility for Canadian citizenship and guarantees equal rights and responsibilities whether citizenship is acquired by birth or naturalization.
- **Immigration and Refugee Protection Act:** Defines eligibility for immigration to Canada. Affirms the fundamental principles of non-discrimination and universality in immigration. The successful integration of permanent residents into Canada is one of its goals.



Implementation in Canada

Legislative protections (continued):

- **Official Languages Act:** Ensures respect for English and French as the official languages of Canada, and equality of status and equal rights and privileges as to their use in all federal institutions. Supports the development of English and French linguistic minority communities. Advances the equality of status and use of English and French within Canadian society.
- **Quebec Charter of the French Language:** Establishes French as the official language of the province of Quebec and guarantees rights to its use in Quebec.
- **Nunavut Official Languages Act:** Establishes Inuit language, English and French as official languages of the Nunavut territory and guarantees rights to their use in Nunavut.



Implementation in Canada

Legislative protections (continued):

- **Broadcasting Act:** Requires the broadcasting system to reflect the linguistic duality and multicultural and multiracial nature of Canadian society, and the special place of Aboriginal peoples within Canadian society. Requires that programming in languages other than French and English be made available. Establishes the Canadian Broadcasting Corporation (CBC) as the national public broadcaster.
- **Copyright Act:** Protects the rights of creators of literary, artistic, musical and dramatic works, and promotes access to these works.
- **Patent Act:** Provides protection for inventions.



Implementation in Canada

Policies and programs, including:

- Programs to preserve and strengthen Aboriginal languages and culture across Canada.
- Programs to preserve and strengthen minority official language communities in Canada.
- Funding to support the work of Canadian artists, writers, musicians, film makers, performers, etc.
- Museums, galleries and archives to preserve and promote Canada's history and cultural heritage.
- Public education through the school system and the media.



How Canada Implements Cultural Rights and Supports Cultural Diversity – Case Studies

Integration of immigrants

- Canada's overall approach is based on encouraging the economic, social and cultural integration of newcomers, and ensuring that the broader Canadian society is welcoming and accommodates diversity.
- Constitutional and other legal human rights protections apply to everyone in Canada, including immigrants, refugees and migrant workers. The Charter contains a few rights that are reserved for citizens only (democratic rights; mobility rights; minority official languages school rights).
- Immigrants are encouraged to become Canadian citizens.

Integration of immigrants

➤ Measures to **integrate immigrants and refugees** into society include:

- **Access to social services**, including education, social security, housing and health care.
- **Settlement services**: There is an extensive network of organizations that provide counselling and settlement assistance to immigrants and refugees in communities across Canada. Services include language training and preparation for employment.
- **Local Immigration Partnerships**: A form of community collaboration for newcomer settlement and integration, that encourages locally-driven planning to assess needs, coordinate services and improve outcomes for immigrants and refugees. Partnership councils include representatives from schools, health centres, ethnocultural groups, police services, libraries, employers and business councils, social services, various levels of government, and newcomers.
- **Foreign Credentials Referral Office**: Provides immigrants trained outside of Canada with information and referral services to facilitate the assessment and recognition of their credentials, and improve their participation in the Canadian labour market.

Integration of immigrants

➤ Measures **to foster a welcoming society** that accommodates diversity include:

- **Equality and anti-discrimination legislation**

- **Anti-racism laws, policies and programs:** Include criminal laws prohibiting hate propaganda; laws requiring judges to consider whether an offence was motivated by bias or hate based on race, colour, or ethnic or national origin as an aggravating factor in sentencing; laws prohibiting the importation into Canada of publications that constitute hate propaganda; laws prohibiting the broadcasting of abusive comments or pictorial representations that are likely to expose individuals or groups to hatred on the basis of race, national or ethnic origin, colour or religion; bias-free policing policy.

- **Public education:** Schools teach children about the importance of respect for diversity; public education campaigns by human rights commissions on anti-discrimination and cultural diversity; government-sponsored public awareness programs that promote intercultural and interfaith understanding; training of government officials on diversity and cultural awareness.

The rights of Aboriginal peoples

What do Aboriginal rights in Canada's Constitution mean?

FACTS: *Ms. Van der Peet, a member of the Sto:lo First Nation, was charged with selling salmon which her partner had caught under the authority of a fishing license which only allowed the holder of the licence to catch fish for food. The law prohibited the sale or barter of fish caught under such a licence. Ms. Van der Peet challenged the law in court as violating her Aboriginal right to sell fish, which she said was protected by section 35 of the Constitution Act, 1982.*

The rights of Aboriginal peoples

“The doctrine of aboriginal rights exists, and is recognized and affirmed by section 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.”

Supreme Court of Canada, *R. v. Van der Peet* (1996)

“The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of section 35 of the Constitution Act, 1982.”

Supreme Court of Canada, *Beckman v. Little Salmon/Carmacks First Nation* (2010)

The rights of Aboriginal peoples

OUTCOME:

- The Supreme Court of Canada held that in order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.
- The practice must have developed before the arrival of Europeans in North America. It can evolve over the years after contact, but a practice that has evolved into modern forms must trace its origins back to the pre-contact period.
- In assessing a claim, the courts must take into account the perspective of Aboriginal peoples themselves, and approach the rules of evidence in light of evidentiary difficulties inherent in adjudicating Aboriginal claims.
- In this case, the Court found that Ms. Van der Peet did not demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo culture which existed before contact with the Europeans. It was therefore not constitutionally protected.

The rights of Aboriginal peoples

OUTCOME (continued):

- Aboriginal rights can be extinguished in two ways: by voluntary surrender to the government, or by constitutional amendment.
- Aboriginal rights can be regulated or limited by the government, but only if the government can show an important objective (e.g., the conservation and management of a limited natural resource), and that the means chosen are consistent with the special trust relationship between the government and Aboriginal peoples.
- The Supreme Court of Canada has held that governments have a duty to consult with and, where necessary, accommodate Aboriginal peoples prior to taking actions that would have an adverse impact on section 35 rights.

Accessibility of cultural goods & services for persons with disabilities

FACTS: *Mr. Vlug, who is deaf, tried on several occasions to watch sporting events and newscasts on CBC television. While some of these programs had closed captioning (a simultaneous transcription of the audio portion of the program, normally displayed at the bottom of the television screen), other programs did not. Mr. Vlug brought a complaint of discrimination on the ground of disability in the provision of services, under the Canadian Human Rights Act. In his complaint, Mr. Vlug emphasized that television captioning would enable the deaf and hard of hearing to be included in the community and share in a common cultural history.*

Accessibility of cultural goods & services for persons with disabilities

OUTCOME:

- The Canadian Human Rights Tribunal held that the CBC's failure to make television programming accessible to the hearing impaired was discriminatory. The lack of captioning meant that persons who are deaf or hard of hearing were not able to enjoy television programs on an equal basis with others.
- The Tribunal ordered the CBC to caption all of its television programs. The Tribunal did not accept that accommodating the hearing impaired would place an undue financial or technical burden on the CBC.
- The Tribunal encouraged the CBC to consult with the deaf and hard of hearing community in determining the best way of delivering captioning services.
- The Tribunal also ordered the CBC to pay Mr. Vlug \$10,000 for pain and suffering.

Accessibility of cultural goods & services for persons with disabilities

Other measures that promote accessibility include:

- Exceptions in the *Copyright Act* for persons with perceptual disabilities, to enable them to make an accessible version of certain copyrighted works
- Mandatory accessibility standards for public spaces and buildings (*Accessibility for Ontarians with Disabilities Act*)
- Mandatory accessibility standards for websites and web content in some jurisdictions
- Programs promoting the participation of persons with disabilities in sport, including the Paralympic Games and the Special Olympics

Resources

- UN Human Rights Committee General Comment No. 23 (ICCPR, Article 27): <http://www2.ohchr.org/english/bodies/hrc/comments.htm>
- UN Committee on Economic, Social and Cultural Rights General Comments No. 17 & No. 21 (ICESCR, Article 15): <http://www2.ohchr.org/english/bodies/cescr/comments.htm>
- Canada's human rights reports to the United Nations: <http://www.pch.gc.ca/pgm/pdp-hrp/docs/publications/index-eng.cfm>
- Canadian immigrant settlement services: <http://www.cic.gc.ca/english/department/partner/bpss/index.asp>
- *R. v. Van der Peet*, [1996] 2 S.C.R. 507: <http://scc.lexum.org/en/1996/1996scr2-507/1996scr2-507.html>
- *Vlug v. CBC*, [2000] C.H.R.D. No. 5: <http://www.canlii.ca/en/ca/chrt/doc/2000/2000canlii5591/2000canlii5591.pdf>
- Accessibility for Ontarians with Disabilities Act: <http://www.mcass.gov.on.ca/en/mcass/programs/accessibility/index.aspx>